IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AARON C. WHEELER, et. al., Plaintiffs	:	
	:	CIVIL ACTION
v.	:	NO. 03-4826
JEFFREY BEARD, et. al., Defendants	:	

Memorandum and Order

YOHN, J. August ___, 2005

Pro se plaintiffs Aaron Wheeler, Theodore Savage, James Pavlichko, and Derrick Fontroy are prisoners currently incarcerated at State Correctional Institution at Graterford ("SCIG") in Pennsylvania. Defendants are four employees of the Pennsylvania Department of Corrections ("DOC Defendants") and Verizon Pennsylvania, Inc.[1] ("Verizon"). Specifically, the DOC Defendants relevant to this part of the case are Jeffrey A. Beard, the Secretary of Corrections; Donald G. Vaughn, the Superintendent of SCIG; John Rosso, the Commissary

[1] Verizon is one of several vendors that plaintiffs have alleged violated federal antitrust laws and committed acts of fraud and misrepresentation in providing goods and services to the inmate population. The other vendors include: Access Catalog Company, Mike's Better Shoes and Jack L. Marcus, Inc.

Manager at SCIG; and Michael Spencer, the Business Manager at SCIG.[2]

Currently pending before the court is plaintiffs' motion requesting that this court either vacate its May 19, 2005 Order pursuant to Federal Rule of Civil Procedure 60(b) or certify three questions for interlocutory appeal under 28 U.S.C. § 1292(b) and defendants' opposition thereto. For the reasons explained below, I will deny plaintiffs' motion.

I. Procedural History

Plaintiffs filed their initial complaint in this matter on August 8, 2003, which was amended twice before assuming its present form on September 8, 2004. Plaintiffs' allegations in the Second Amended Complaint fall into three categories: 1) constitutional claims against DOC Defendants relating to the conditions of confinement and retaliation claims based on their having filed an earlier lawsuit, 2) antitrust claims against DOC Defendants and vendors under §§ 1 and 2 of the Sherman Act and the Clayton Act, and 3) fraud and misrepresentation claims against DOC Defendants and vendors.

Several defendants in the case filed motions to dismiss prior to the submission of the Second Amended Complaint. These motions were renewed, and, in some cases modified or supplemented, following submission of the Second Amended Complaint. In a May 19, 2005 Order, this court granted motions to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), plaintiffs' antitrust and common law fraud and misrepresentation claims. However, the order allowed

[2] In addition to naming Beard, Vaughn, Rosso and Spencer, who are alleged in the Second Amended Complaint to have violated federal antitrust laws and to have committed fraud and misrepresentation, plaintiffs sued thirty-four other DOC employees, alleging civil rights violations. This opinion will focus solely on the antitrust, fraud and misrepresentation claims, while the civil rights claims are the subject of a separate disposition. The parties referred to in this case as the "DOC Defendants" are actually a subset of a larger group of DOC defendants named in the case.

plaintiffs to supplement their Second Amended Complaint to allege in a new count that the facts underlying their fraud claims state a claim for breach of contract against Access Catalog Company and Mike's Better Shoes.

In response to the May 19, 2005 Order, the plaintiffs filed a motion asking this court to vacate the order under Fed. R. Civ. P. 60(b), or, in the alternative, to certify three questions for interlocutory appeal under 28 U.S.C. § 1292(b). DOC Defendants and Verizon filed responses in opposition to plaintiffs' motion.

II. Legal Standards

A. Legal Standard for Rule 60(b)

While the determination to grant or deny relief is within the sound discretion of the court, relief under Rule 60(b) "is available only in cases evidencing extraordinary circumstances." *Lasky v. Cont'l Prods. Corp.*, 804 F.2d 250, 256 (3d Cir. 1986) (quoting *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975)). "Thus a party seeking such relief must bear a heavy burden of showing . . . that, absent such relief an 'extreme' and 'unexpected' hardship will result." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977) (quoting *U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932)).

B. Legal Standard for 28 U.S.C. § 1292(b)

"The decision to certify an order for appeal under § 1292(b) lies within the sound discretion of the trial court." *Crane v. Am. Home Mortgage Corp.*, 2004 WL 2577498, at *3 (E.D. Pa. Oct. 24, 2000). Certification is only appropriate in "exceptional" cases. *Piazza v. Major League Baseball*, 836 F.Supp. 269, 270 (E.D. Pa. 1993). The Third Circuit has indicated that "[t]he certification procedure is not mandatory; indeed permission to appeal is wholly within

the discretion of the courts, even if the [§ 1292(b)] criteria are present." *Bachowski v. Usery*, 545 F.2d 363, 368 (3d Cir. 1976). Another court has indicated that "the court must remember that certification is generally not to be granted. . . . Section 1292(b) was not designed to circumvent the general rule against piecemeal litigation." *Max Daetwyler Corp. v. Meyer*, 575 F.Supp. 280, 282 (E.D. Pa.1983).

III. Discussion

A. Plaintiffs' Rule 60(b) Argument

Plaintiffs contend that they are entitled to relief from this court's May 19, 2005 Order pursuant to Rule 60(b) due to alleged legal errors in the order. Relief under Rule 60(b) is inappropriate both because the order was not "final" as required by Rule 60(b) and because legal error alone does not warrant application of the rule. Accordingly, plaintiffs' request for relief under Rule 60(b) is denied.

Rule 60(b) allows a party to seek relief only from a "final judgment, order, or proceeding." Rule 60(b)'s definition of "final" is similar, if not identical, to that of 28 U.S.C. § 1291, the statute that grants courts of appeals jurisdiction of appeals from final decisions of district courts. *See Torres v. Chater*, 125 F.3d 166, 168 (3d Cir. 1997) (noting that "[t]here is an interdependence between the 'finality' required for Rule 60(b) and section 1291); *see also Penn West Assocs., Inc. v. Cohen*, 371 F.3d 118 (3d Cir. 2004) (quoting, with approval, the statement in *Kapco Mfg. Co. v. C & O Enters.*, 773 F.2d 151, 153 (7th Cir. 1985), that "Rule 60(b) must be limited to review of orders that are independently 'final decisions' under 28 U.S.C. § 1291").

The Third Circuit has described a final decision as "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Selkridge v. United of*

Omaha Life Ins. Co., 360 F.3d 155 (3d Cir. 2004) (citations omitted). Thus, "there is no final order if claims remain unresolved and their resolution is to occur in the district court." *Aluminum Co. of Am. v. Beazer East, Inc.*, 124 F.3d 551, 557 (3d Cir. 1997).

Vitally, "a district court decision dismissing some, but not all, of the claims before the court is not a 'final' order that can be appealed." *N.Y. Football Giants, Inc. v. C.I.R.*, 349 F.3d 102, 106 (3d Cir. 2003). Here, the May 19 Order did not dispose of all of plaintiffs' claims: it did not consider plaintiffs' various constitutional claims against the DOC Defendants, and allowed the plaintiffs leave to supplement their complaint to allege a count of breach of contract against defendants Access Catalog Company and Mike's Better Shoes. Thus, because claims remain for this court to resolve, the Rule 60(b) finality requirement is not satisfied. Accordingly, plaintiffs' motion to vacate under Rule 60(b) must be denied.

Even if the court's May 19, 2005 Order were a final decision, the error that plaintiffs allege is not of the type for which Rule 60(b) provides relief. Plaintiffs aver that this court's order was inconsistent with controlling case law and therefore legally incorrect. They do not allege any specific error as described in Rule 60(b)(1-6),[3] such as mistake, newly discovered

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[3] In relevant part, Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

evidence or fraud, *inter alia*. Instead, plaintiffs merely assert legal error. However, "legal error does not by itself warrant the application of Rule 60(b). . . . Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6)." *Pridgen v. Shannon*, 380 F.3d 721 (3d Cir. 2004) (quoting *Martinez-McBean v. Gov't of V.I.*, 562 F.2d, 908, 912 (3d Cir. 1977). Therefore, even if plaintiffs' motion did challenge a final order, it would still not yield relief under Rule 60(b). This part of plaintiffs' motion will be denied.

B. Plaintiffs' 28 U.S.C. § 1292(b) Argument

In the alternative, plaintiffs request that this court certify three questions for interlocutory appeal under 28 U.S.C. § 1292(b). These questions contest the order's dismissal of their antitrust, fraud and misrepresentation claims. Because the order in this case lacks the characteristics required by the statute, this motion will be denied as well.

The court may exercise its discretion to grant § 1292(b) certification only if the court's order: (1) involves a "controlling question of law," (2) contains "substantial ground for difference of opinion" regarding its propriety, and (3) if appealed without delay would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Katz v. Carte Blanche Corporation*, 496 F.2d 747, 754 (3d Cir. 1974) (describing these requirements). Also, certification should only be granted in "exceptional" cases. *Piazza*, 836 F.Supp. at 270.

In this case, plaintiffs neither make reference to the requirements of the statute nor offer any argument in support of their request. Instead, they proffer a bald request for certification, arguing that this court's order was legally incorrect. However, "a court should not grant a motion under § 1292 simply because a party disagrees with the district court judge's decision." *Crane v. Am. Home Mortgage Corp.*, 2004 WL 2577498, at *3 (E.D. Pa. Oct. 24, 2000).

Notwithstanding plaintiffs' failure to support their request, certification in this case is simply not appropriate. If this order were appealed immediately, it would not "materially advance the ultimate termination of the litigation" as required by § 1292(b).

In determining whether certification of an appeal would "materially advance the ultimate termination of the litigation," one court "examined whether an immediate appeal would 1) obviate the need for a trial; 2) eliminate complex issues thereby greatly simplifying the trial; [or] 3) eliminate issues thus making discovery much easier and less costly." *Zygmuntowicz v. Hospitality Invs., Inc.*, 828 F.Supp. 346, 353 (E.D. Pa. 1993) (citing *In re Magic Marker Sec. Litig.*, 472 F.Supp. 436, 438 (E.D. Pa.1979)). In this case, plaintiffs are seeking to return dismissed issues and parties to the case, which mitigates against the time-saving values described by *Zygmuntowicz*. Certification for appeal may also "materially advance the ultimate termination of the litigation" when certification would help to avoid duplicate trials with overlapping facts. *See Gustavson v. Vito*, 1989 WL 89217, at *6 (E.D. Pa. Aug. 2, 1989) (noting that if the trial court's decision were reversed on appeal, a second trial on the same subject with two additional defendants could be necessary). In this case, there is no risk that a second, substantially similar trial would occur if the order is later reversed on appeal. The dismissed claims consider allegations of antitrust violations, fraud, and misrepresentation, while the remaining claims examine alleged civil rights violations. The two areas of inquiry are sufficiently disparate to obviate the danger of repetitive trials.

Accordingly, because certifying plaintiffs' questions for appeal would not advance the efficient termination of this litigation, their request will be denied.

IV. Conclusion

Plaintiffs' Rule 60(b) motion will be denied because the May 19, 2005 Order was not a final decision by the court and because plaintiffs' allegations refer only to legal error, which is not an appropriate ground for vacating a decision under Rule 60(b). Plaintiffs' 28 U.S.C. § 1292(b) request for certification for interlocutory appeal will be denied because certification would not materially advance the case closer to its ultimate termination.

An appropriate order follows.

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Order

And now, this _____ day of August 2005, upon careful consideration of plaintiffs' motion for relief from judgment under Fed. R. Civ. P. 60(b) and request for certification for interlocutory appeal under 28 U.S.C. § 1292(b) (Doc. No. 245), and defendants' opposition thereto, it is hereby ORDERED that the motion is DENIED.

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William H. Yohn, Jr., Judge